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No. 588

ILLINOIS CENTRAL RAILROAD COMPANY, [illegible]
MOBILE AND OHIO RAILROAD COMPANY, [illegible]
SISSIPPI EXPORT RAILROAD COMPANY, [illegible]

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, [illegible]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF MISSISSIPPI.

STATEMENT AS TO JURISDICTION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No.

ILLINOIS CENTRAL RAILROAD COMPANY, GULF, MOBILE AND OHIO RAILROAD COMPANY, MISSISSIPPI EXPORT RAILROAD COMPANY, ET AL.,
Appellants,

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

STATEMENT AS TO JURISDICTION.

In compliance with Rules 13 and 15 of this Court, Illinois Central Railroad Company, *et al.*, appellants, submit herewith this statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, entered on October 12, 1954.

OPINIONS BELOW.

The opinion of the specially constituted District Court of three judges (together with the dissenting opinion of

District Judge Thomas) is reported at 124 F. Supp. 809. The report of the Interstate Commerce Commission is found at 291 I. C. C. 39. The opinion of the District Court and the dissenting opinion of Judge Thomas are attached hereto as Appendix A. The final judgment of the District Court is attached hereto as Appendix B.

BASIS OF JURISDICTION.

I.

This is an action brought by the Mississippi Public Service Commission, in which certain shippers intervened as plaintiffs, to annul, set aside, and enjoin an order of the Interstate Commerce Commission entered under section 13(4) of the Interstate Commerce Act, 49 U. S. C. § 13(4), fixing intrastate rates for the transportation within Mississippi of certain commodities after a finding that the rates made or imposed on such commodities by authority of the State of Mississippi caused and for the future would cause undue, unreasonable, and unjust discrimination against interstate commerce.

II.

The final judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, was entered on October 12, 1954. Notice of appeal was filed in said Court on December 9, 1954. By order entered February 1, 1955, the time for docketing this appeal was extended to February 28, 1955.

III.

The jurisdiction of this Court to review on appeal the final judgment of the District Court is conferred by 28 U. S. C. § 1253, 62 Stat. 928.

IV.

Cases which sustain the jurisdiction of this Court to review on appeal the final judgment of the District Court are *King* v. *United States* (1952), 344 U. S. 254; *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. R. Co.* (1922), 257 U. S. 563; *Northern Pacific Railway Co.* v. *Montana* (1952), 344 U. S. 905.

V.

The principal provisions of the Interstate Commerce Act which are involved in this proceeding are as follows:

Sec. 13(4) [41 Stat. 484; 49 U. S. C. § 13(4)]:

"(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Sec. 15a(2) [54 Stat. 912; 49 U. S. C. § 15a(2)]:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due

consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

QUESTION PRESENTED.

The question presented by this appeal is whether, in setting aside and permanently enjoining the order of the Interstate Commerce Commission prescribing, under section 13(4) of the Interstate Commerce Act, certain intrastate freight rates in Mississippi on the ground that such order was not supported by substantial evidence, the District Court misapprehended or grossly misapplied the standard for determining the substantiality of evidence approved by this Court in *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474.

STATEMENT OF THE CASE.

This is an appeal from a final judgment of a specially constituted United States District Court of three judges which, with one judge dissenting, set aside and enjoined an order of the Interstate Commerce Commission prescribing under section 13(4) of the Interstate Commerce Act, 49 U. S. C. § 13(4), intrastate rates for the transportation within Mississippi of cottonseed and products thereof, soybeans and products thereof, fertilizer and fertilizer materials, lumber and articles taking the lumber rates, pulpwood, sand and gravel, and brick and related articles in the brick list,* herein referred to as the excepted commodi-

* Cement and refined petroleum in tank cars were originally included in the order but were later eliminated from the order and are no longer involved in the case.

ties. The Commission found that the intrastate rates required to be maintained on such commodities by authority of the State of Mississippi resulted and for the future would result in undue, unreasonable, and unjust discrimination against interstate commerce in violation of section 13(4) of the Interstate Commerce Act and ordered such discrimination removed by applying to the Mississippi intrastate rates and charges on the excepted commodities the same respective increases as were authorized in *Increased Freight Rates, 1951,* 284 I. C. C. 589, to be maintained on like interstate traffic between points in Mississippi and adjoining States.

In *Increased Freight Rates, 1951,* 284 I. C. C. 589, commonly referred to by the docket number of the proceeding, *Ex Parte* No. 175, the Commission authorized the rail carriers to increase by 15 percent their interstate freight rates and charges subject to certain exceptions and maximum increases.*

Similar increases were sought in Mississippi intrastate freight rates and charges by the carriers operating in Mississippi. After lengthy proceedings, the Mississippi Commission granted a general increase in rates to correspond to that granted by the Interstate Commerce Commission but it made certain exceptions with respect to the commodities which are involved in this proceeding. No increase was permitted by the Mississippi Commission on sand and gravel or brick and related articles. On the remaining commodities, an increase of 6 percent was permitted. The excepted commodities are very important

* The increase authorized in *Ex Parte* No. 175 for application to the interstate rates on the excepted commodities was 15 percent except that on sand and gravel the authorized increase was 12 percent and on lumber and related articles the authorized increase was 15 percent with a maximum increase of 12 cents per 100 pounds.

and produce the major portion of appellants' intrastate freight revenue in Mississippi.

In response to a petition of the rail carriers operating in Mississippi, the Interstate Commerce Commission instituted under section 13(3) of the Act an investigation into the lawfulness of the Mississippi intrastate freight rates and charges on the excepted commodities. After a hearing, briefs, proposed report, exceptions, and oral argument, the Interstate Commerce Commission found that the rates which the State of Mississippi compelled the carriers to maintain caused and for the future would cause undue, unreasonable, and unjust discrimination against interstate commerce and ordered such discrimination removed by applying to the Mississippi intrastate freight rates and charges the same increases as were authorized on like interstate traffic by the Interstate Commerce Commission in *Ex Parte No.* 175. *Mississippi Intrastate Freight Rates and Charges,* 291 I. C. C. 39.

The Mississippi Commission, on March 11, 1954, filed its complaint in the District Court to set aside and enjoin the order of the Interstate Commerce Commission. Several shippers intervened as plaintiffs in the action. These appellants, rail carriers operating in Mississippi, intervened as defendants. On March 17, 1954, after a hearing, the United States District Judge to whom the case was assigned denied the applications of the plaintiff and intervening plaintiffs for a temporary restraining order, and on March 19, 1954, the rates ordered by the Interstate Commerce Commission became effective.

On May 31, 1954, a hearing was held before the three-judge court on the applications of plaintiff and intervening plaintiffs for a temporary and a permanent injunction. At the close of the hearing, the Court in open court denied the applications for a temporary injunction. On the following day, however, the parties were informed by tele-

phone that the Court would grant a temporary injunction. Such an injunction was granted effective June 15, 1954, with one judge dissenting, and the rates which had been allowed to become effective on March 19, 1954, were cancelled.

On October 12, 1954, the Court, with one judge dissenting, entered a final judgment annulling and setting aside the order of the Interstate Commerce Commission and permanently enjoining its enforcement. Notice of appeal was filed December 9, 1954. By order entered February 1, 1955, the time for docketing this appeal was extended to February 28, 1955.

THE QUESTION PRESENTED IS SUBSTANTIAL.

In this case appellants are asking this Court to condemn a philosophy of judicial review based upon the application of a technique and a standard which are completely at variance with those previously established by this Court. The standard applied by the District Court in this case for determining the substantiality of the evidence, far from being sanctioned by *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474, is indeed based upon a misapprehension and gross misapplication of the standard approved by this Court in that case.

Merely stating briefly some of the more important errors made by the District Court shows how far the District Court strayed from the standards which this Court has set up for reviewing orders of the Commission prescribing intrastate rates under section 13(4) of the Act.

a.

The District Court relied on the fact that there "was no separation made by the railroads of their revenues, expenses and properties as between interstate and intra-

state operations" (124 F. Supp. at 815) although it is well known that such a separation between interstate and intrastate operations is impracticable and the Commission, an expert body having knowledge of such matters, has so held on numerous occasions. *Wyoming Intrastate Freight Rates and Charges* (1953), 287 I. C. C. 743, 755. This Court has also held that no such separation is required, *Illinois Commerce Comm.* v. *United States* (1934), 292 U. S. 474, 483-4, and has held that the power of the Commission to require an increase in intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return "on the value of property devoted to the transportation service, both interstate and intrastate." *United States* v. *Louisiana* (1933), 290 U. S. 70, 75; *North Carolina* v. *United States* (1945), 325 U. S. 507, 520.

b.

The District Court held that "In order to authorize the Commission to exercise the power to nullify intrastate rates under section 13(4) of the Act, it must be shown * * * (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; * * *" (124 F. Supp. at 813) although the findings of the Commission establish beyond question that the basis of the order is "undue, unreasonable, and unjust discrimination against interstate commerce" (291 I. C. C. at 64) and not undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand. This distinction was clearly pointed out by this Court in *Florida* v. *United States* (1931), 282 U. S. 194, 214. See also *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. Co.* (1922), 257 U. S. 563, 586-7.

c.

The District Court held that "The findings of a state commission which is familiar with * * * conditions in the state * * * when its opinion differs from the Interstate Commerce Commission's findings detracts [*sic*] heavily against the findings of the Interstate Commerce Commission * * *" (124 F. Supp. at 815) although there is no legal basis for giving any weight whatsoever to the findings of the Mississippi Commission made in another proceeding, under a State statute involving dissimilar issues, upon evidence which is not a part of this record.

d.

The District Court held that "There is no testimony in the record having probative force showing that the rates in Mississippi were abnormally low other than the disparity that exists between the interstate rates and the intrastate rates which within itself is not sufficient" (124 F. Supp. at 815) although this Court, in *King* v. *United States* (1952), 344 U. S. 254, 271-2, held that substantially the same findings as were made here, and upon substantially the same type of evidence, "go far beyond the bare disparity between the existing intrastate rate and the proposed minimum rate which is in substantial uniformity with the interstate rate."

e.

The District Court was erroneously influenced by the fact that the testimony before the Interstate Commerce Commission was "taken before an examiner" (124 F. Supp. at 816) while, in the proceeding before it, the Mississippi Commission heard the testimony "itself and not through an examiner" (124 F. Supp. at 814). Furthermore, the Court's finding that the Mississippi Commission

was "as a matter of fact, in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission" (124 F. Supp. at 816) is utterly without foundation.

f.

The District Court repeatedly referred to the fact that it was called upon to "weigh" the testimony before the Commission, particularly with respect to the effect of competition upon the reasonableness of rates and with respect to the revenue effect of the increased rates, both of which matters are outside the competence of the District Court.

g.

The District Court held that "The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole," (124 F. Supp. at 817) although the discussion in the Commission's report, 291 I. C. C. at 63, shows that the Commission did not disregard such evidence. The Commission's finding that there is no indication that passenger-train eliminations have effected greater economies in Mississippi than on other parts of the appellants' systems and the finding that there is no sound basis for the contention that rate variations are justified because of variations in passenger revenue are clearly supported both by the law and by the evidence.

Numerous other errors were committed by the District Court, but those pointed out above are sufficient to indicate how radically the District Court departed from the standards which up to now have always governed the review of Interstate Commerce Commission orders in the courts. The District Court purports to justify such de-

partures on the basis of the decision of this Court in *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474. Whether the previously accepted standards of judicial review of such orders have been so materially altered by *Universal Camera* presents a substantial question for the consideration of this Court.

Because of their greatly increased costs of operation in the post-war period, the railroads of the country have been granted several general increases in rates to carry out the intent of the National Transportation Policy, 54 Stat. 899, 49 U. S. C., preceding § 1. Such increased operating costs are incurred on intrastate as well as interstate traffic. Most States have permitted increases in intrastate rates similar to those in interstate rates. Where some of the States have not done so, as here, there have often been proceedings under section 13(4) of the Act to remove the unjust discrimination against interstate commerce caused by the failure of intrastate traffic to bear its fair share of the transportation burden.

Such orders as have been, or may be, entered by the Commission under section 13(4) of the Act ought to be judged by the same standards no matter in what court they may be reviewed. To leave the determination of such matters to the arbitrary judgment of individual courts is unfair to the Commission, the rail carriers, the shippers, and the State authorities and is a result which was obviously not intended by *Universal Camera.*

What can happen when different courts do not apply substantially similar standards for determining the substantiality of evidence is illustrated by a case recently decided per curiam by this Court, *Louisiana Public Service Commission* v. *United States,* No. 351, October Term 1954, decided November 22, 1954, in which this Court upheld the validity of an order of the Interstate Commerce Commission prescribing under section 13(4) of the Act

intrastate rates on certain commodities moving within the State of Louisiana. The Louisiana and Mississippi cases were tried before the Commission in the same month. To be sure, no two cases are exactly alike, but these cases involved the same issues and the evidence presented in both of them was substantially similar. In both cases the Commission's findings were substantially the same, but the Louisiana order was upheld by a District Court and the Mississippi order was set aside by a different District Court in a split decision. The incongruity of this situation was pointed out by the appellants in the Louisiana case in their reply to the motions to affirm and their petition for rehearing.

One illustration should suffice at this point to show how far the Mississippi District Court has departed from the previously accepted standards of judicial review. In discussing appellants' testimony with respect to the revenue effect of the increases sought, the District Court said:

> "The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked, but their testimony has been fully weighed in the light of the entire record and proceedings in this case and when viewed in this light the testimony fails to show substantiality sufficient to uphold the order here under attack and the findings that were made by the Interstate Commerce Commission." 124 F. Supp. at 816.

For the District Court to find that "the testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests" did not amount to substantial evidence is a contradiction in terms, and the only way the Court could make such a finding was to substitute its judgment as to the weight of the evidence for that of the Commission.

Predictions of "experienced railroad traffic men" as to the revenue effect of increased rates have been approved by this Court. *United States* v. *Louisiana* (1933), 290 U. S. 70, 80. See, also, *Florida* v. *United States* (1934), 292 U. S. 1, 9. The District Court recognizes that there was in the record the "testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests." There was also in the record here, as there was in the Louisiana case and in almost every case under section 13(4) of the Act, considerable testimony of shippers who testified that the carriers would not gain additional revenue from the rate increases. But the power to decide "between two fairly conflicting views" of the evidence, even under *Universal Camera,* belongs to the Commission and not to the District Court "even though the court would justifiably have made a different choice had the matter been before it *de novo.*" 340 U. S. at 488.

The repeated references of the District Court to the effect that it must "weigh" the testimony cannot be ascribed merely to an unfortunate choice of language, but clearly indicate the application of an erroneous standard of judicial review and one which is in no way sanctioned by *Universal Camera.*

It is recognized that there must of necessity be some margin for individual judgment, but this Court made it clear in *Universal Camera* that

> "* * * a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in." 340 U. S. at 489.

How the judicial judgment could be any more at large than it was in the District Court in this case would be difficult to imagine and the construction of a few fences is clearly called for.

CONCLUSION.

Whether all previous standards of judicial review of orders of the Interstate Commerce Commission under section 13(4) of the Act from *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. R. Co.* (1922), 257 U. S. 563, to *King* v. *United States* (1952), 344 U. S. 254, are now to be disregarded upon the authority of *Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U. S. 474, presents a substantial question for the consideration of this Court and one of importance to the Commission, the railroads, and the shippers.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT.
For the Southern District of Mississippi.
Jackson Division.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *Plaintiff,* *vs.* THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants.*	Civil Action No. 2120.

OPINION.

MIZE, *J.*

This is an action seeking to annul, set aside, and permanently enjoin enforcement of an order of the Interstate Commerce Commission entered February 1, 1954, in accordance with the report findings and conclusions entered November 2, 1953, in the proceeding No. 31164, *Mississippi Intrastate Freight Rates and Charges,* under which the respondent rail carriers operating in Mississippi were required to establish intrastate freight rates and charges in Mississippi no lower than the rates and charges prescribed and provided for in said report. The action was filed by the Mississippi Public Service Commission against the United States and the Commission, and served upon the Commission March 15, 1954. Answers have been filed by the United States, by the Commission, and railroad respondents operating in Mississippi. Certain shippers and

associations, as named in the several motions, have intervened in support of the Mississippi Commission. The case was heard on its merits and upon an application for a temporary injunction by consent at the same time. The temporary injunction was granted pending a final judgment.

The Commission proceedings were instituted October 17, 1952, upon the filing of a petition by seventeen railroads, with a supplemental petition filed November 21, 1952, seeking an order, after investigation, to authorize increase of intrastate freight rates in Mississippi, to the same extent and in the same manner as authorized by the Commission in respect to interstate rates and charges, in *Ex Parte* No. 175, *Increased Freight Rates,* 1951, 284 I. C. C. 589, hereinafter referred to as X-175. The railroads had, prior to filing petitions with the Commission, filed petitions with the Mississippi Commission, seeking approval of the increased rates, which were denied by order of that Commission, entered November 8, 1952. By order of December 5, 1952, Division 1 of the Commission ordered such investigation and a hearing before an examiner for February 2, 1953, at Jackson, Mississippi.

After the hearing a report by Examiner Vandiver was filed and served on May 27, 1953. The proposed report found that the intrastate rates imposed by the Mississippi Commission on cottonseed and products thereof, soy beans and products thereof, fertilizer and fertilizer materials, lumber and articles listed as taking the lumber rates, pulpwood, sand and gravel, cement, brick and related articles in the brick list, and refined petroleum in tank cars, were abnormally low, and traffic thereunder fails to produce its fair share of revenue to enable railroad respondents to provide adequate and efficient service, and such rates cause undue, unreasonable, and unjust discrimination against interstate commerce. The Mississippi Commis-

sion and three protestants filed exceptions to said report, and respondent railroads filed reply thereto.

The Commission entered its report on November 2, 1953, 291 I. C. C. 39. Ultimate findings of the Commission are set forth in the report and are substantially the same as those proposed by the Examiner. The report provided that an order would be issued making the findings effective, unless notified within 30 days after service, by the Mississippi Commission, that it would promptly permit the approved increases. Upon petitions of the Mississippi Commission, the Commission, by orders dated November 25 and December 23, 1953, extended the date on which such notification should be given to February 1, 1954. The Mississippi Commission and three protestants filed petitions for reconsideration of the report of November 2, 1953, which were denied by the Commission order of February 1, 1954, under which respondent railroads were ordered to establish the intrastate rates prescribed for the commodities named in the report, on March 19, 1954, effective upon five days' notice. Petition of the Mississippi Commission was filed March 9, 1954, to amend the order of February 1, 1954, so as to remove therefrom the requirement to increase intrastate rates on refined petroleum in tank cars. By Commission order of March 10, 1954, the order of February 1, 1954, was so amended.

The Commission authorized, in X-175, a general increase of fifteen per cent on basic interstate freight rates and charges, subject to certain exceptions and modified increases, which was the fourth general increase since World War II. The railroads operating in Mississippi filed petition with the State Commission, seeking the same increases on intrastate rates and charges as authorized on interstate rates under X-175.

The Mississippi Commission had a full hearing and

authorized an increase in intrastate rates and charges of the full fifteen per cent on all less than carload freight and upon all carload freight, except as to carload line haul rates of brick and related articles upon which the Mississippi Commission granted no increase, cement, upon which the Mississippi Commission granted no increase, fertilizer and fertilizer materials, upon which the Mississippi Commission authorized a six per cent increase, lumber, upon which the Mississippi Commission authorized a six per cent increase, pulpwood, upon which the Mississippi Commission authorized a six per cent increase, sand and gravel, upon which the Mississippi Commission granted no increase, cottonseed and products thereof, upon which the Mississippi Commission authorized a six per cent increase, soya beans and the products thereof, upon which the Mississippi Commission authorized a six per cent increase, cattle feed made 65% or more of cotton seed or soya bean products, upon which the Mississippi Commission authorized a six per cent increase, and refined petroleum in tank cars, upon which the Mississippi Commission authorized an increase of six per cent. Upon all of the commodities excepted the increase authorized by the Interstate Commerce Commission was fifteen per cent with the single exception of sand and gravel upon which the interstate increase was twelve per cent.

Cattlefeed made 65% or more of cottonseed or soya bean products is not involved in this case as same was excepted from the report and order of the Interstate Commerce Commission. Refined petroleum in tank cars is likewise not involved in this proceedings for the reason that, by order dated February 23, 1954, the Mississippi Commission ordered that the intrastate rates for that commodity be increased the full fifteen per cent authorized in *Ex Parte* No. 175. All of the remaining excepted commodities are in issue, there being involved the differ-

ential in the increases authorized by the Mississippi Commission and the Interstate Commerce Commission as outlined above.

The Commission report, finding 3, prescribed the interstate increase on all the commodities excepted by the Mississippi Commission. The rates involved herein relate only to said excepted commodities as an issue, of which refined petroleum in tank cars was removed by the Commission order of March 10, 1954, entered after the Mississippi Commission had approved the interstate increase for that commodity.

The ultimate issue relates to the validity of the orders of the Commission requiring the rail carriers to increase their Mississippi *intrastate* rates and charges to the same level prescribed in the report of November 2, 1953. Section 13(4) prohibits two types of preference and discrimination, in respect to intrastate and interstate rail rates, preference and prejudice as to persons and localities, and discrimination against interstate commerce. The Commission report of November 2, 1953, found that no evidence was offered as to undue prejudice to interstate shippers. The remaining issue relates only to discrimination against interstate commerce. Paragraphs XII and XIII of the complaint allege illegality of the final report and order of the Commission, on grounds there stated of violation of constitutional rights; action beyond the scope of statutory authority; unsupported by substantial evidence or contrary to evidence; and arbitrary action.

The paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission. The law in recent years has been fully announced and declared by the Supreme Court.

The Interstate Commerce Commission has no general authority to regulate intrastate rates. The mere existence of a disparity between interstate and intrastate

rates does not authorize the Commission to enter a field properly consigned and belonging to the state regulatory body and interfere with rates established by state authority. Section 13(4) of the Interstate Commerce Act does not automatically require complete uniformity in intrastate and interstate rates but the state commission may fix a lower intrastate rate than the interstate rate, unless an undue advantage to intrastate traffic and an unfair discrimination against interstate traffic results therefrom. This rule was properly and clearly declared by the Supreme Court of the United States in the case of *North Carolina* v. *United States,* 65 S. Ct. 1260, 325 U. S. 507, 89 L. Ed. 1760.

The true rule is that, whenever the Commission attempts to exert the power to interfere with intrastate rates which are otherwise in the dominion of state regulation, the justification for the exercise of such power by the Commission must clearly appear of record. Otherwise, the Commission's action is a clear and unlawful encroachment upon the reserved power and authority of the state.

In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13(4) of the Act, it must be shown, among other things, (a) that the intrastate rates involved are abnormally low and are not contributing their fair share of the revenue of the carriers involved; (b) that the disparity between the rates is substantial and operates as a real discrimination against and obstruction to interstate commerce; (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; (d) that the proposed rates are just and reasonable; and (e) that a substantial increase in the carriers' revenue will result from the proposed increase in the intrastate rates. *North Carolina* v. *United States, supra.* The Court further held in that case that the power of the Commission to require

states to raise their intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operation costs and to yield a fair return on the value of the property directed to the transportation service both interstate and intrastate. Moreover, it reaffirmed the doctrine that the Commission could not require intrastate rates to be raised above a reasonable level.

The Interstate Commerce Commission is granted wide powers to prescribe rates on interstate freight as well as other transportation matters. That function belongs primarily and exclusively within the limits of the Act to the Commission; however, its authority over intrastate rates is limited as above set out and Section 13(4) of the Act was never intended to deprive the state commission of their primary authority to regulate intrastate rates. There is a point where the power of the state commission ceases and the power of the Interstate Commerce Commission begins, but as stated by Mr. Justice Black in the *North Carolina* case, it is not always easy to designate that point.

Other principles of law have been clearly declared by the Supreme Court of the United States. Intrastate traffic must bear a fair proportionate share of the costs of maintaining an adequate railway system. *Wisconsin Railroad Commission* v. *Chicago B. & Q. Railway,* 257 U. S. 563. It is within the power of the Interstate Commerce Commissior to determine if the intrastate rates do that; however, before it can alter intrastate rates the justification therefor must clearly appear and be supported by substantial evidence. It is not sufficient that there be simply a difference between interstate rates fixed by the Commission and the intrastate rates as fixed by the state commission. The fixing of intrastate rates is primarily the duty of the state commission and the record in this case

demonstrates that the Mississippi Commission gave great study and investigation and heard much testimony before the commission itself and not through an examiner. If the evidence is substantial to support the finding of the Interstate Commission, then its power and its conclusions override that of the state commission, but a mere disparity of itself in the rates fixed by each commission is not sufficient. *Florida* v. *United States,* 282 U. S. 194. Whenever the findings of the Commission are supported by substantial evidence, then the findings of such commission are conclusive upon the courts, but if such findings are not supported by substantial evidence, then the matter is one for the court to determine and such order cannot be upheld. In determining in the first instance whether intrastate rates should be raised or lowered the Interstate Commerce Commission is allowed wide latitude in directing that intrastate rates be increased and may take into consideration material and reports which were before the Commission in previewing a nationwide increase in interstate freight rates. The Commission's jurisdiction over intrastate rates is not limited to cases where those rates are confiscatory. *King, et al.* v. *United States, et al.,* 344 U. S. 254.

The Court in reviewing an order of the Interstate Commerce Commission has the duty to study the entire record and it is the function of the Court to determine from the whole record whether or not there was substantial evidence before the Commission upon which its order could be based. If there were no substantial evidence then it is the duty of the Court to set aside such order and enjoin its enforcement. Congress in enacting in 1946 the Administrative Procedure Act made it mandatory that the reviewing court should set aside an order that was unsupported by substantial evidence and that it should review the whole record in making the determination. The Su-

preme Court of the United States in *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474 held that in determining what is substantial evidence that the Court must take into consideration whatever in the record fairly detracts from its weight. Under the decision in that case it is the duty of the reviewing court when it cannot conscientiously find that the evidence supporting the order of the Commission is substantial, when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view, to set aside the order of the Commission.

Substantial evidence is a legal term and presents to the court for adjudication a question of law. It is a term that frequently appears in the construction of many laws. There are many instances in which judgments are required to be supported by substantial evidence. The verdicts of juries in some states are required to be supported by substantial evidence and it then becomes a question for determination by the court as to whether or not a verdict is supported by substantial evidence and if it is not, then the court reverses and directs that judgment be entered when not supported by substantial evidence. The decisions on this matter are numerous. See Words and Phrases, Permanent Edition, Vol. 40, 1954 Annual Pocket Part, P. 88. Substantial evidence is a term that cannot be defined definitely, but whether the evidence in a particular case amounts to substantiality must be determined from the facts of each case as it arises.

The order in this case when viewed in the light of the entire record and all of the circumstances leading up to its passage and giving weight to all things that detract from the sufficiency of the evidence is not supported by substantial evidence and must be set aside and its enforcement enjoined. It is a delicate duty placed upon the reviewing court to determine the line of demarkation and

to adjudicate the point where the authority of the state commission ends. The court does not have the power to settle disputes in the testimony, but it must consider the entire record and determine as a matter of law if there was substantial evidence to support the order. The record shows that in making the investigation for the nation as a whole in *Ex Parte* No. 175 that the Commission at that time was making a determination that the intrastate rates should be increased as well as the interstate rates. That will not do. There must be a finding based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers. The record of the evidence in the case reflects a favorable financial condition of the railroads involved herein when contrasted with that of the railroads of the country as a group. The statistics introduced in evidence and reflected by the various reports show that the national average of returns for the railroads was 4.02 per cent; whereas, the condition of the railroads involved in this controversy was in a better financial situation and their earnings greater than the 4.02 per cent. The Interstate Commerce Commission in *Ex Parte* No. 175, when granting freight rate increases took into consideration the losses sustained by the railroads in passenger operations. This was correct and was upheld in *King* v. *United States,* 344 U. S.

254, but in determining the intrastate rate in Mississippi the Commission refused to take into consideration the lower passenger deficits which prevailed in Mississippi. There is no testimony in the record having probative force showing that the rates in Mississippi were abnormally low other than the disparity that exists between the interstate rates and the intrastate rates which within itself is not sufficient. Different conditions, circumstances and situations in different states require and justify different results in fixing intrastate rates. The findings of a state commission which is familiar with such conditions in the state, with the location of competing highways and other forms of carriers, when its opinion differs from the Interstate Commerce Commission's findings detracts heavily against the findings of the Interstate Commerce Commission, whose testimony is taken before an examiner. The record shows in this case that the need of the carriers involved here for additional revenue is not as great as the needs of the railroads of the country as a whole. The statistics introduced in evidence and now in the record demonstrate this.

The testimony of the various witnesses who are shippers of many of the products involved herein demonstrates that if the rates are permitted to stand as fixed by the Interstate Commerce Commission, the income of the railroads will be reduced rather than increased. Many of these are shippers themselves and testified positively and unequivocally that it would be economy for them to use their own individual trucks or private carriers by truck, who are unregulated so far as rates are concerned in Mississippi. When the intrastate freight rate level on a given commodity is at such level that any increase in the rate would have the effect of diverting traffic from the rail carriers to competing forms of transportation, then it would follow that the revenue derived would be diminished rather than in-

creased. In fixing reasonable rates competition is one of the elements to be considered and is frequently controlling. See *Interstate Commerce Commission* v. *Great Western Railway Company*, 141 Fed. 1003. In determining the legal question as to whether the evidence amounts to substantiality and in adjudicating whether there was substantial evidence or not, the court likewise must weigh such factors. The record shows in this case that the Mississippi Commission was thoroughly familiar with the competition prevailing and with the location of the sites for gravel, the location of the highways and as a matter of fact, in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission, but, of course, its findings must yield to those of the Interstate Commerce Commission, if the record as a whole shows that there was substantial evidence.

The Interstate Commerce Commission found that the increase granted in the rates by it would produce more than $550,000.00 annually on all of the commodities involved. This finding was based upon estimates made by experts of the railroad companies that such revenue would be produced if the rate increase be given. The testimony upon this proposition is exceedingly weak. It is based upon the presumption that the same amount of freight traffic would continue under the increased rate as had theretofore been carried at the lower rate. This assumption and opinion is contrary to the sworn testimony of those who were in position not only to know but also to control large quantities of the products upon which the rate was increased. The evidence to support this finding when weighed in the light of the prevailing rule of law is not sufficient to amount to substantial evidence.

The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but their testi-

mony has been fully weighed in the light of the entire record and proceedings in this cause and when viewed in this light the testimony fails to show substantiality sufficient to uphold the order here under attack and the findings that were made by the Interstate Commerce Commission. It would unduly prolong this opinion to undertake to point out in detail the testimony of the various witnesses and the things that detract from the substantiality of the evidence, but it is demonstrated more closely with reference to sand and gravel, the pulpwood and the fertilizer and cement that is involved. The record is clear in this case that the revenue needs of the railroads of the Eastern District and in the South or Western District and the financial condition of the petitioning railroads involved in this case are in better condition than the national average.

On the trial before this Court there was introduced in evidence Plaintiff's Exhibit 4, which was a petition by the railroads made to the Interstate Commerce Commission seeking a modification of the Commission's order so as to authorize lower rates upon sand and gravel and Plaintiff's Exhibit 5, being an order thereon granting the prayer of the petition. There was no objection to the introduction of these documents but even if they should have been irrelevant as having occurred since the filing of the suit, it still would be true that there was not sufficient substantial evidence to support the order but if these documents be considered, they simply demonstrate that the higher rate given the railroads would cause the traffic to divert to competitors. The commodities involved in this controversy require shorter hauls than do the interstate shipments and are therefore more susceptible to competition. On all of the commodities involved in the controversy the competition by carriers is keen and would come not only from regulated trucks for hire but from unregulated trucks and

from trucks owned and operated by the shippers themselves. This is clearly shown by the record by positive testimony and overwhelmingly overthrows and overrides the opinions of the experts.

The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole. The Mississippi Commission offered evidence showing that passenger deficits in Mississippi were substantially less than passenger deficits of the same railroads for their systemwide operation and according to the statistics introduced there was a vast difference. Passenger deficit is an element to be taken into consideration in rate making by the Interstate Commerce Commission, and as a matter of law, it is the duty of that Commission to consider it in determining whether rates should be increased or decreased, and if the passenger deficit in Mississippi was less than that of the nation as a whole, it was the duty of the Commission to give proper consideration to this testimony. *King* v. *United States, supra.*

At the time the original complaint herein was filed and at the time of the hearing and when the case was submitted to the Court for judgment, cement in carload lots was one of the commodities involved and an intervention by the Marquette Cement Manufacturing Company was allowed but since that date the Marquette Cement Manufacturing Company, one of the intervening plaintiffs, moved to be permitted to withdraw its intervention for the reasons stated in the motion and likewise the plaintiff moved to amend its complaint so as to eliminate cement from the commodities at issue and without objection an order was entered on the 13th day of September, 1954, sustaining each of said motions. The complaint was amended so as to eliminate cement and the petition of the Marquette Ce-

ment Company was dismissed for the reasons stated in said motions, there being no objections from any one of these motions.

For the reasons herein stated the order of the Interstate Commerce Commission will be set aside and its enforcement enjoined.

Order may be drawn in accord herewith.

Jackson, Mississippi, September 21, 1954.

/s/ E. R. Holmes,
United States Circuit Judge,

/s/ S. C. Mize,
United States District Judge.

In the United States District Court
For the Southern District of Mississippi,
Jackson Division.

Mississippi Public Service Commission, *Plaintiff,* *vs.* The United States of America and The Interstate Commerce Commission, *Defendants.*	Civil Action No. 2120

OPINION.

Thomas, *District Judge,* dissenting:

As stated by Judge Mize in the majority opinion, the paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission. The law is well settled "that an order of the Commission is entitled to finality, and may not be set

aside, modified, or disturbed on judicial review, if such order of the Commission lies within the scope of the Interstate Commerce Statute, and is based upon adequate findings that are supported by substantial evidence.'"[1] There is no question but that the order of the Commission lies within the scope of the statute. In discussing the limitation upon the right of courts to review orders of the Commission, in the case of *Interstate Commerce Commission* v. *Union Pacific Railroad Company,* 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108, the court said:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.,* 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In my opinion, the findings made by the Commission in support of its conclusion are entirely adequate, and fulfill the needs emphasized in the case of *North Carolina, et al.* v. *United States, et al.,* 325 U. S. 507, 89 L. Ed. 1760, 65 S. Ct. 1260.

The record must be considered as a whole. I have considered the record as a whole and am of the opinion that

1. *Louisiana Public Service Commission* v. *United States of America and the Interstate Commerce Commission,* U. S. District Court, Eastern District of Louisiana, decided July 9, 1954.

on the authority of *King, et al.* v. *United States, et al.*, 344 U. S. 254, 97 L. Ed. 301, 73 S. Ct. 259, the order complained of has a rational basis in adequate findings, which are supported by substantial evidence.

I respectfully dissent from the majority opinion.

/s/ DANIEL H. THOMAS.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Mississippi,
Jackson Division.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *Plaintiff*, *vs.* UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants.*	Civil Action No. 2120

FINAL JUDGMENT.

This cause came on for hearing before the statutory three-judge court duly convened by the Chief Justice of the Circuit pursuant to Sections 2284 and 2325 of Title 28 of the United States Code by designating as additional judges the Honorable E. R. Holmes, Justice of the Court of Appeals for the Fifth Circuit, and the Honorable Daniel H. Thomas, Judge of the United States District Court for the Southern District of Alabama, upon final hearing upon the complaint of the Mississippi Public

Service Commission, plaintiff in the above entitled cause, praying for a final decree that the report of the Interstate Commerce Commission dated November 2, 1953, and its order dated February 1, 1954, and each of them, are unlawful, null and void, and that the enforcement of said report and order be permanently enjoined, restrained, annulled and set aside, and that the Interstate Commerce Commission be directed to enter an order dismissing the proceedings entitled In The Matter of Mississippi Intrastate Freight Rates and Charges, I. C. C. Docket No. 31164, in which said report and order were entered.

It appearing that the above entitled cause was duly set down for final hearing at Jackson, Mississippi, on the 31st day of May, 1954, and that proper notice of said hearing was given to the plaintiff, the defendants and to all intervenors herein, and that all parties were present in person or by counsel; and, upon consideration of the plaintiff's verified complaint and the answers thereto, and upon consideration of the record of the proceedings before the Interstate Commerce Commission in that proceedings entitled In The Matter of Mississippi Intrastate Freight Rates and Charges, I. C. C. Docket No. 31164, and upon consideration of all other evidence introduced at the hearing, and the arguments and briefs of counsel, the Court is of the opinion and finds that the plaintiff, Mississippi Public Service Commission, is entitled to a permanent injunction and to the relief prayed for in its complaint for the reasons more fully set forth in majority opinion heretofore filed in this cause.

It is, therefore, ordered, adjudged and decreed by said statutory three-judge court that the report of the Interstate Commerce Commission dated November 2, 1953, and its order dated February 1, 1954, both having been entered in that proceedings entitled In The Matter of Mississippi Intrastate Freight Rates and Charges, I. C. C.

Docket No. 31164, and each of them, are unlawful, null and void, and are hereby set aside and annulled, and that the enforcement thereof be, and it is hereby, permanently enjoined.

It appearing to the Court that the parties intervening on the side of the defendants in this action are quite numerous, it is further ordered that service of this order on their counsel shall be equivalent to personal service on them.

So ordered, adjudged and decreed this the 12th day of October, 1954.

/s/ E. R. Holmes,
E. R. Holmes,
Judge of the Court of Appeals for the Fifth Circuit.

/s/ S. C. Mize,
S. C. Mize,
Judge of the United States District Court for the Southern District of Mississippi.

I dissent from the foregoing for the reasons set forth in my dissenting opinion heretofore filed in this cause.

/s/ Daniel H. Thomas,
Daniel H. Thomas,
Judge of the United States District Court for the Southern District of Alabama.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No.

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

STATEMENT AS TO JURISDICTION

In compliance with Rule 13 of the Rules of the Supreme Court of the United States, as revised, the Interstate Commerce Commission submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the district court entered in this cause on October 12, 1954. Notice of appeal was filed in the district court December 9, 1954.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Mississippi is reported at 124 F. Supp. 809, and a copy is appended hereto (Appendix A). A copy of the final judgment of the district court is also appended (Appendix B). The

report of the Interstate Commerce Commission appears at 291 I. C. C. 39.

JURISDICTION

The jurisdiction of the Supreme Court to review the decision in this case is conferred by 28 U. S. C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Court to review the judgment on direct appeal: *New York* v. *United States,* 257 U. S. 591; *United States* v. *Louisiana,* 290 U. S. 70; *Montana* v. *United States,* 290 U. S. 593; *King* v. *United States,* 344 U. S. 254.

QUESTIONS PRESENTED

Since 1946 the Interstate Commerce Commission, hereinafter called the Commission, has authorized four general percentage increases in interstate railroad freight rates. The last of these, hereinafter referred to as Ex Parte 175,[1] authorized the railroads to increase, among others, their interstate rates in southern territory 15 percent on most commodities (smaller increases being authorized on a few). On petition of the railroads operating in Mississippi, the Mississippi Public Service Commission (hereinafter called the Mississippi Commission) authorized like percentage increases in the Mississippi intrastate rates on all less-than-carload freight and on all carload freight except certain specified commodities (described in detail hereinafter).

[1] *Increased Freight Rates, 1951,* 284 I. C. C. 589, decided April 11, 1952.

In a proceeding under section 13 (4) of the Interstate Commerce Act, the Commission increased the Mississippi intrastate rates on the excepted commodities by the percentages previously applied in Ex Parte 175. The Commission's order was grounded upon findings that the lower intrastate rates caused unjust discrimination against interstate commerce. The Mississippi Commission brought suit in the district court to set aside the order, and the court, after a hearing, and with one judge dissenting, entered a judgment enjoining enforcement of the order. The questions presented on this appeal are:

(1) Whether there is substantial evidence in the record made before the Commission to support its detailed findings, which covered, *inter alia,* the reasonableness of the interstate and the intrastate rates, the relationship between them, the effect on such relationship of the interstate rate increases, the conditions under which the two classes of traffic moved and were handled; also to support the Commission's ultimate finding that the Mississippi intrastate rates were not contributing their fair share to the railroads' total revenue requirements, and therefore discriminated against interstate commerce;

(2) Whether the district court erroneously substituted its opinion and judgment for that of the Commission as to certain questions of fact and as to the weight to be given to certain evidence;

(3) Whether the district court erred in holding that the evidence was legally insufficient because it did not show a separation of the railroads' revenues, expenses, and property values, as between interstate and intrastate operations in Mississippi;

(4) Whether the district court erred in holding that in order for the Commission to exercise its power to remove discrimination against interstate commerce there must be a showing that injury to interstate shippers has resulted and will continue to result because of the disparity between the interstate and intrastate rates; and

(5) Whether the district court correctly held that the Commission "committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole." This presents also the question whether the Commission actually did disregard the evidence as to passenger deficits.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C., Sec. 1 *et seq.*, are as follows:

> SEC. 13 (3): Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge,

classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

SEC. 13 (4): Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or

localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 15a (2): In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

STATEMENT

Since the end of World War II, the operating costs of the railroads throughout the United States has risen sharply, and the volume of traffic has declined. To meet the need for additional revenue, the Interstate Commerce Commission has given four general freight rate increases since the war. The first three, Ex Parte 162, 266 I. C. C. 537 (effective January 1, 1947), Ex Parte 166, 270 I. C. C. 403 (effective August 21, 1948), and Ex Parte 168, 276 I. C. C. 9 (effective September 1, 1949), authorized increases in interstate freight rates in the southern territory, including Mississippi, of 15, 25, and 10 percent, respectively. Following each of those decisions the Mississippi Commission allowed certain increases in the intrastate rates in Mississippi, but did not in each instance allow as large an increase as the Commission had authorized in the interstate rates.

The fourth general increase, Ex Parte 175, 284 I. C. C. 589 (decided April 11, 1952), out of which this case arose, allowed the railroads in southern territory a further increase in interstate rates of 15 percent (with certain exceptions [2] noted below). Thereafter the railroads operating in Mississippi applied to the Mississippi Commission for permis-

[2] An increase of only 12 percent was authorized in the interstate rates on sand and gravel in open-top cars, and the increase on lumber and articles listed in tariffs as taking the lumber rates was subject to a maximum of 12 cents per 100 pounds.

sion to increase their Mississippi intrastate rates to the extent authorized in Ex Parte 175 on interstate traffic. The Mississippi Commission allowed the percentage increase on less-than-carload traffic, and on some carload traffic, but as to carload shipments of the following excepted commodities it allowed only a part of the increases sought, or none at all, as indicated:

	Increase permitted (percent)
Cottonseed and products thereof	6
Soybeans and products thereof	6
Fertilizer and fertilizer materials	6
Lumber and articles taking lumber rates	6
Pulpwood	6
Sand and gravel (in open-top cars)	None
Brick and related articles	None

Following the refusal of the Mississippi Commission to authorize the increases sought, the railroads, proceeding under section 13 (4) of the Act, petitioned the Interstate Commerce Commission to increase the Mississippi intrastate rates to the extent authorized in Ex Parte 175 on interstate rates. The Commission, after a full hearing, granted the requested increases in the Mississippi intrastate rates on the above-named commodities. It found and concluded that the existing rates on those commodities were abnormally low and were not contributing their fair share of the earnings required to enable the railroads to provide adequate and efficient railway transportation service and thereby accomplish the purposes of the Interstate Commerce Act as set forth in the national transportation policy

declared by the Congress; and that the intrastate rates were causing, and for the future would cause, undue, unreasonable, and unjust discrimination against interstate commerce, and that such discrimination should be removed by applying to the Mississippi intrastate rates on the named commodities the same respective increases as are and for the future may be maintained by the railroads on like interstate traffic between points in Mississippi and points in adjoining States under the authorization in Ex Parte 175.

The Commission based its conclusion upon the following subsidiary findings, *inter alia:* that the conditions incident to the intrastate transportation of freight in Mississippi were not more favorable than those incident to the interstate transportation in Mississippi and adjoining States; that the interstate and intrastate traffic moved in Mississippi under substantially similar conditions, and were handled by the same crews on the same trains with the same equipment; that the existing interstate rates were just and reasonable; that the increases in intrastate rates would yield the railroads more than $550,000 additional revenue annually, and would not result in unreasonable rates or rates unreasonable in relation to interstate rates; and, with respect to the railroads' discontinuance of several allegedly unprofitable passenger trains in Mississippi, that there was no indication that the economies there-

by effected in Mississippi were greater than on other portions of the railroads' lines.

On the Mississippi Commission's petition for review of the order increasing the intrastate rates, a three-judge district court, one judge dissenting, set aside the Commission's order and enjoined its enforcement. The majority of the court held that the order was not supported by substantial evidence. The opinion shows on its face, however, that the majority reached that conclusion only after itself weighing the evidence and substituting its judgment for that of the Commission on questions of fact, which this Court has consistently held are within the exclusive province of the Commission to decide. It appears also that the decision was grounded on several propositions of law which, as will hereinafter be pointed out in detail, either have no application to the instant case or have been rejected as unsound in recent decisions of this Court.

THE QUESTIONS ARE SUBSTANTIAL

One of the major problems that has faced the Interstate Commerce Commission since the end of World War II has been the deteriorating financial condition of the railroads. Increasing costs and declining revenues seriously threatened the carriers' ability to render efficient service and carry out the National Transportation Policy (49 U. S. C. preceding Section 1). To deal with this situation, the Commission has granted certain

overall percentage increases in interstate freight rates. In the proceeding here involved, the Commission found that the increased operating costs were not confined to interstate traffic, but were incurred as well on Mississippi intrastate traffic.[3]

Although most of the state commissions have made adjustments in intrastate rates corresponding to those authorized by the Interstate Commerce Commission for interstate traffic, a small number have refused to do so. In such situations the affected railroads have ordinarily invoked the power given the Interstate Commerce Commission by section 13 (4) of the Interstate Commerce Act. That section empowers the Commission to remove discrimination against interstate commerce by raising intrastate rates, when it finds such action necessary to insure that "the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value

[3] "* * * The increase sought on Mississippi traffic was part of a nationwide increase proposed by the railroads in Ex Parte No. 175, which was authorized on interstate traffic throughout the country, including that to, from, and through Mississippi, and was applied also on intrastate traffic generally within most of the States. The railroads' needs for additional revenue to meet increased operating expenses, as determined in that proceeding, was the underlying basis for the increase authorized. The increased operating costs were not confined to interstate traffic, but were, and are, incurred as well on Mississippi intrastate traffic. That and other intrastate traffic was included in estimating the yield from the rate increase authorized." 291 I. C. C. 39, 63.

of the property devoted to the transportation service, both interstate and intrastate." *Florida* v. *United States,* 292 U. S. 1, 5.

In setting aside the Commission's order in the present case, the district court did not hold that the findings made by the Commission were inadequate. Certainly, it could not properly so hold, because the findings are substantially the same as those which this Court approved and sustained in the recent case of *King* v. *United States,* 344 U. S. 254. The decision appears to be based primarily upon what the majority of the district court said was a lack of substantial evidence to support the Commission's findings. It appears, however, that the court reached that conclusion because of a misconception on its part of its function as a reviewing court and because it attempted to try the case *de novo,* in disregard of the Commission's function as the evidence-weighing and fact-finding body.

(a) The district court substituted its judgment for that of the Commission on factual questions

As will be noted from its opinion, the district court paid lip service, at least, to the rule of administrative finality, long ago announced and frequently reiterated by this Court.[4] It stated

[4] *Interstate Commerce Comm.* v. *Union Pacific R. Co.*, 222 U. S. 541, 547; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139; *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 488.

that "Whenever the findings of the Commission are supported by substantial evidence, then the findings of such commission are conclusive upon the courts" (124 F. Supp. 814). The opinion contains many other statements, however, which show clearly that the court, in examining the record made before the Commission, did so not merely to determine whether there was substantial evidence to support the Commission's findings, but for the purpose of itself weighing the evidence and making its own findings and decision upon the factual questions involved, independent of and feeling in no sense bound by the findings of fact already made by the Commission.

For example, in commenting upon the Commission's finding that the increase granted in the intrastate rates would produce more than $550,000 per year in additional revenue for the railroads, the court said (124 F. Supp. 816):

> * * * This finding was based upon estimates made by experts of the railroad companies that such revenue would be produced if the rate increase be given. *The testimony upon this proposition is exceedingly weak.* * * * The evidence to support this finding *when weighed* in the light of the prevailing rule of law is not sufficient to amount to substantial evidence. [Emphasis added.]

Again, referring to the "testimony of the various witnesses and experts who testified for the carriers", the district court said (124 F. Supp.

816) *"their testimony has been fully weigh* * * * and fails to show substantiality sufficient uphold the order here under attack and the fi ings that were made." [Emphasis added.]

The two statements we have quoted, and oth which may be found in the opinion, show clear it seems to us, that the district court went mu further in weighing the evidence than this Co has indicated a reviewing court should go. recognize, of course, that the review must inclu "the whole record" and that "The substantiali of evidence must take into account whatever the record fairly detracts from its weigh *Universal Camera Corp.* v. *Labor Board,* 3 U. S. 474, 488. But, as this Court also said that case, the requirement for canvassing t whole record was not "intended to negative t function of [an agency] presumably equipped informed by experience to deal with a specializ field of knowledge, whose findings within th field carry the authority of an expertness whi courts do not possess and therefore must respe Nor does it mean that even as to matters not quiring expertise a court may displace t [agency's] choice between two fairly conflicti views, even though the court would justifiab have made a different choice had the matter be before it de novo. * * *" (p. 488 of 340 U. S

What this Court in the *Universal Camera* ca said a reviewing court should not do is, we subm exactly what the district court did do in the i

stant case. It displaced the Commission's "choice between two fairly conflicting views" as to questions of fact, even though, as shown by the opinion, "the whole record" contains substantial evidentiary support for the Commission's judgment and findings. Our contention to this effect is strongly supported by the dissenting opinion of District Judge Thomas, who stated that he had "considered the record as a whole" and was "of the opinion that on the authority of [the *King* case, *supra*] the order complained of has a rational basis in adequate findings, which are supported by subtantial evidence."

The decision of the district court appears also to have been influenced by its belief (124 F. Supp. 816) that "the Mississippi Commission was thoroughly familiar with the competition prevailing * * * and as a matter of fact *in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission* * * *." [Emphasis added.] This is a further indication of the court's unwillingness to accept the Commission's findings of fact, even though supported by substantial evidence.

Another such instance is the court's statement (124 F. Supp. 815) that "The findings of a state commission which is familiar with such conditions in the state, * * * when its opinion differs from the Interstate Commerce Commission's findings, detracts heavily against the findings of the

Interstate Commerce Commission, whose testimony is taken before an examiner."

The fact that the evidence received by the Commission was taken before an examiner, instead of before the entire Commission, appears to have prejudiced the court[5] against the evidence, for at still another place in its opinion it referred to that circumstance, using this language (124 F. Supp. 814):

> * * * the Mississippi Commission gave great study and investigation and heard much testimony before the Commission itself *and not through an examiner.* [Emphasis added.]

Thus the district court indicated its preference for the state commission's findings and judgment as to the facts over those of the Interstate Commerce Commission, the only body charged by Congress with the responsibility for ascertaining and determining whether the considered intrastate rates were causing discrimination against interstate commerce to the detriment of the national transportation system.

This action of the district court presents a substantial and very serious question for determination by this Court. For if the decision of the district court is permitted to stand, based as

[5] This attitude on the part of the court appears to be inconsistent with the Supreme Court's views as to the weight to be given an examiner's findings. See *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 492–497.

it is upon the court's (rather than the Commission's) weighing of the evidence and ascertainment of the facts, not only will fundamental principles of administrative law long ago established by this Court be overturned, but, what is more, the Commission's power under section 13 (4) to increase intrastate rates in order to remove discrimination against interstate commerce will be effectively nullified.

(b) The district court based its decision upon misconception of the law

Even though the undisputed evidence shows that it was not possible for the railroads to segregate their Mississippi intrastate operating revenues, costs, and property values from those pertaining to interstate operations, and this Court has many times held, under such circumstances, that segregation is not required,[6] the district court nevertheless assigned as one of its reasons for setting aside the Commission's order that "There was no separation made by the railroads of their revenues, expenses, and properties as between interstate and intrastate operations" (124 F. Supp. 815). This holding, we submit, was clearly erroneous.

[6] *Illinois Commerce Commn.* v. *United States*, 292 U. S. 474, 483; *Montana* v. *United States*, 2 F. Supp. 448, affd., 290 U. S. 593; *New York* v. *United States*, 331 U. S. 284, 335; *King* v. *United States*, 344 U. S. 254.

The opinion of the majority of the district court also contains the following statement (124 F. Supp. 813):

> In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13 (4) of the Act, it must be shown, among other things, * * * (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; * * *.

While such a showing probably would be required in order to sustain a finding of unlawful preference and prejudice as to persons and localities, the Commission made no such finding in this case, and such preference and prejudice is in no sense involved. The Commission's order is grounded, rather, upon discrimination against interstate commerce, and there was no occasion or legal need for proof of any injury to interstate shippers. Thus, again, the district court based its decision upon a misconception of the law on the case before it.

Another error of the district court is indicated by the following statement in the opinion of the majority (124 F. Supp. 817):

> The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole. * * *

An examination of the Commission's report will show that it did *not* disregard the evidence as to

passenger deficits. On the contrary, it gave careful consideration[7] to that evidence, found as a fact that it did not sustain the contention of the Mississippi Commission, and thereupon concluded that there was no sound basis for the contention.

It is clear, therefore, that what the district court actually found wrong with the Commission's consideration of the mentioned evidence

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[7] The Commission's report states (291 I. C. C. 39, 63):

"The Mississippi commission presented data designed to show that the discontinuance of several passenger trains in Mississippi and the furnishing of relatively less day-train service in that State than on other portions of the respondents' lines have resulted in proportionately smaller deficits in passenger revenue in that State. It argues that those changes have effected relatively greater economies in the respondents' intrastate operations than on other portions of their lines, requiring proportionately smaller contributions by the intrastate freight revenue to cover passenger-revenue deficits in Mississippi, which should be reflected in the level of the intrastate freight rates in relation to the interstate rates.

"The respondents' passenger-service operations have shown deficits in each of the years 1940 through 1951, except for 1943 through 1945. They have become progressively larger each year, aggregating $60,249,439 in 1951. The passenger-train eliminations in recent years have affected all portions of their system lines. There is no indication that the economies effected in Mississippi were relatively greater than on other portions of their lines. The novel theory of rate-making advanced by the Mississippi commission contemplates that the freight-rate structure would vary according to variations in the passenger revenue by territories, areas, States, and possibly by individual lines of railroad. Some of the respondents operate no passenger service. There is no sound basis for the contention that rate variations are justified because of such variations in passenger revenues."

was that the Commission did not accord to that evidence the weight the district court accorded to it, and did not reach the same conclusion and make the same factual finding the district court thought should be made thereon. This, we submit, was but another instance of the district court's misconception of the law and of its own function as a reviewing court, in substituting itself for the Commission as the evidence-weighing and fact-finding body.

As already pointed out, the findings made by the Commission in this case were, in substantially the same form, held adequate in *King* v. *United States, supra.* Section 13 orders based upon equivalent findings were thereafter sustained in *Montana* v. *United States,* 117 F. Supp. 174 (after remand, 344 U. S. 905, of a prior adverse decision of a district court); *Tennessee* v. *United States,* 113 F. Supp. 634, affd., 346 U. S. 891, reh. den., 346 U. S. 928; and *Louisiana* v. *United States,* 125 F. Supp. 180, affd., 348 U. S. 885, reh. den., January 10, 1955, — U. S. —.

In *Louisiana* v. *United States, supra,* which was decided during the present term of the Supreme Court (No. 351, October Term, 1954), the appellants emphasized, on page 20 of their reply to the motions to affirm, that the *Louisiana* case and the instant *Mississippi* case were companion cases, involving many of the same commodities, the principal difference between the two cases being "that the State of Mississippi prevailed in

the district court, whereas the State of Louisiana did not."[8] We agree as to the similarity of the two cases, and that they should be decided alike. Such being the situation, and this Court already having affirmed the judgment sustaining the Commission's order in the *Louisiana* case, we submit that the judgment in the *Mississippi* case setting aside the Commission's order should not be permitted to stand, but should be reversed and the order sustained. Compare *Montana* v. *United States*, 344 U. S. 905, in which this Court, without

[8] In their petition for rehearing, at pp. 7–8, the appellants in the *Louisiana case* stated:

"Mississippi has fared better than Louisiana in its 13th Section case. Involving substantially the same issues and having been heard about the same time, the three-judge federal district court below, by a 2 to 1 decision, enjoined the Interstate Commerce Commission from its attempt to interfere with and usurp the fixing of Mississippi intrastate freight rates. We attached the opinion of the Mississippi Federal District Court to our reply to motions to affirm (page 27, et seq.). Louisiana, praying for relief, meets with much frustration its adjacent neighbor, Mississippi, which has secured relief and cannot possibly lose it without having an opportunity to present oral argument to this Court. If on appeal of the Mississippi case the motion to affirm of Mississippi is granted, that state has permanent relief from the Interstate Commerce Commission's actions. If its motion to affirm is denied, the matter is then set down for oral argument. It is our understanding of the revised rules that the lower court decision may not be reversed in such matters without plenary consideration with briefs on the merits and oral argument. So it is not only possible but very probable that Mississippi will win its case and Louisiana lose its case under these peculiar and unique circumstances involving identical issues."

assigning the case for oral argument, remanded the judgment of the district court which had set aside a Commission order of the type here involved.

CONCLUSION

The problems posed by the instant case are recurring ones that inevitably arise whenever the Commission has to increase intrastate rates to remove discrimination against interstate commerce. Their resolution by the Supreme Court is of great concern to the Commission in carrying out its statutory duties, to the railroads in rendering efficient public service, and to the public as consumers, shippers and travelers.

For the foregoing reasons we believe the questions presented by this appeal are substantial and of public importance. We urge, therefore, that jurisdiction be noted, and, following the precedent of the *Montana* case, 344 U. S. 905, that the judgment of the district court be reversed, and that court directed to dismiss the complaint.

Respectfully submitted,

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Assistant General Counsel,
Interstate Commerce Commission.

FEBRUARY 1955.

APPENDIX A

In the United States District Court for the Southern District of Mississippi, Jackson Division

Civil Action No. 2120

MISSISSIPPI PUBLIC SERVICE COMMISSION, PLAINTIFF *v.* THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

OPINION

MIZE, J.

This is an action seeking to annul, set aside, and permanently enjoin enforcement of an order of the Interstate Commerce Commission entered February 1, 1954, in accordance with the report findings and conclusions entered November 2, 1953, in the proceeding No. 31164, *Mississippi Intrastate Freight Rates and Charges,* under which the respondent rail carriers operating in Mississippi were required to establish intrastate freight rates and charges in Mississippi no lower than the rates and charges prescribed and provided for in said report. The action was filed by the Mississippi Public Service Commission against the United States and the Commission, and served upon the Commission March 15, 1954. Answers have been filed by the United States, by the Commission, and railroad respondents operating in Mississippi. Certain shippers and associations, as named in the several motions, have intervened in support of the Mississippi Com-

mission. The case was heard on its merits and upon an application for a temporary injunction by consent at the same time. The temporary injunction was granted pending a final judgment.

The Commission proceedings were instituted October 17, 1952, upon the filing of a petition by seventeen railroads, with a supplemental petition filed November 21, 1952, seeking an order, after investigation, to authorize increase of intrastate freight rates in Mississippi, to the same extent and in the same manner as authorized by the Commission in respect to interstate rates and charges, in Ex Parte No. 175, *Increased Freight Rates, 1951,* 284 I. C. C. 589, hereinafter referred to as X–175. The railroads had, prior to filing petitions with the Commission, filed petitions with the Mississippi Commission, seeking approval of the increased rates, which were denied by order of that Commission, entered November 8, 1952. By order of December 5, 1952, Division 1 of the Commission ordered such investigation and a hearing before an examiner for February 2, 1953, at Jackson, Mississippi.

After the hearing a report by Examiner Vandiver was filed and served on May 27, 1953. The proposed report found that the intrastate rates imposed by the Mississippi Commission on cottonseed and products thereof, soybeans and products thereof, fertilizer and fertilizer materials, lumber and articles listed as taking the lumber rates, pulpwood, sand and gravel, cement, brick and related articles in the brick list, and refined petroleum in tank cars, were abnormally low, and traffic thereunder fails to produce its fair share of revenue to enable railroad respondents to pro-

vide adequate and efficient service, and such rates cause undue, unreasonable, and unjust discrimination against interstate commerce. The Mississippi Commission and three protestants filed exceptions to said report, and respondent railroads filed reply thereto.

The Commission entered its report on November 2, 1953, 291 I. C. C. 39. Ultimate findings of the Commission are set forth in the report and are substantially the same as those proposed by the Examiner. The report provided that an order would be issued making the findings effective, unless notified within 30 days after service, by the Mississippi Commission, that it would promptly permit the approved increases. Upon petitions of the Mississippi Commission, the Commission, by orders dated November 25 and December 23, 1953, extended the date on which such notification should be given to February 1, 1954. The Mississippi Commission and three protestants filed petitions for reconsideration of the report of November 2, 1953, which were denied by the Commission order of February 1, 1954, under which respondent railroads were ordered to establish the intrastate rates prescribed for the commodities named in the report, on March 19, 1954, effective upon five days' notice. Petition of the Mississippi Commission was filed March 9, 1954, to amend the order of February 1, 1954, so as to remove therefrom the requirement to increase intrastate rates on refined petroleum in tank cars. By Commission order of March 10, 1954, the order of February 1, 1954, was so amended.

The Commission authorized, in X–175, a general increase of fifteen percent on basic inter-

state freight rates and charges, subject to certain exceptions and modified increases, which was the fourth general increase since World War II. The railroads operating in Mississippi filed petition with the State Commission, seeking the same increases on intrastate rates and charges as authorized on interstate rates under X–175.

The Mississippi Commission had a full hearing and authorized an increase in intrastate rates and charges of the full fifteen percent on all less than carload freight and upon all carload freight, except as to carload line haul rates of brick and related articles upon which the Mississippi Commission granted no increase, cement, upon which the Mississippi Commission granted no increase, fertilizer and fertilizer materials, upon which the Mississippi Commission authorized a six percent increase, lumber, upon which the Mississippi Commission authorized a six percent increase, pulpwood, upon which the Mississippi Commission authorized a six percent increase, sand and gravel, upon which the Mississippi Commission granted no increase, cottonseed and products thereof, upon which the Mississippi Commission authorized a six percent increase, soya beans and the products thereof, upon which the Mississippi Commission authorized a six percent increase, cattle feed made 65% or more of cotton seed or soya bean products, upon which the Mississippi Commission authorized a six percent increase, and refined petroleum in tank cars, upon which the Mississippi Commission authorized an increase of six percent. Upon all of the commodities excepted the increase authorized by the Interstate Commerce Commission was fifteen per-

cent with the single exception of sand and gravel upon which the interstate increase was twelve percent.

Cattlefeed made 65% or more of cottonseed or soybean products is not involved in this case as same was excepted from the report and order of the Interstate Commerce Commission. Refined petroleum in tank cars is likewise not involved in this proceeding for the reason that, by order dated February 23, 1954, the Mississippi Commission ordered that the intrastate rates for that commodity be increased the full fifteen percent authorized in Ex Parte No. 175. All of the remaining excepted commodities are in issue, there being involved the differential in the increases authorized by the Mississippi Commission and the Interstate Commerce Commission as outlined above.

The Commission report, finding 3, prescribed the interstate increase on all the commodities excepted by the Mississippi Commission. The rates involved herein relate only to said excepted commodities as an issue, of which refined petroleum in tank cars was removed by the Commission order of March 10, 1954, entered after the Mississippi Commission had approved the interstate increase for that commodity.

The ultimate issue relates to the validity of the orders of the Commission requiring the rail carriers to increase their Mississippi *intrastate* rates and charges to the same level prescribed in the report of November 2, 1953. Section 13 (4) prohibits two types of preference and discrimination, in respect to intrastate and interstate rail rates, preference and prejudice as to persons and

localities, and discrimination against interstate commerce. The Commission report of November 2, 1953, found that no evidence was offered as to undue prejudice to interstate shippers. The remaining issue relates only to discrimination against interstate commerce. Paragraphs XII and XIII of the complaint allege illegality of the final report and order of the Commission, on grounds there stated of violation of constitutional rights; action beyond the scope of statutory authority; unsupported by substantial evidence or contrary to evidence; and arbitrary action.

The paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission. The law in recent years has been fully announced and declared by the Supreme Court.

The Interstate Commerce Commission has no general authority to regulate intrastate rates. The mere existence of a disparity between interstate and intrastate rates does not authorize the Commission to enter a field properly consigned and belonging to the state regulatory body and interfere with rates established by state authority. Section 13 (4) of the Interstate Commerce Act does not automatically require complete uniformity in intrastate and interstate rates but the state commission may fix a lower intrastate rate than the interstate rate, unless an undue advantage to intrastate traffic and an unfair discrimination against interstate traffic results therefrom. This rule was properly and clearly declared by the Supreme Court of the United States in the case of *North Carolina* v. *United States,* 65 S. Ct. 1260, 325 U. S. 507, 89 L. Ed. 1760.

The true rule is that, whenever the Commission attempts to exert the power to interfere with intrastate rates which are otherwise in the dominion of state regulation, the justification for the exercise of such power by the Commission must clearly appear of record. Otherwise, the Commission's action is a clear and unlawful encroachment upon the reserved power and authority of the state.

In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13 (4) of the Act, it must be shown, among other things, (a) that the intrastate rates involved are abnormally low and are not contributing their fair share of the revenue of the carriers involved; (b) that the disparity between the rates is substantial and operates as a real discrimination against and obstruction to interstate commerce; (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; (d) that the proposed rates are just and reasonable; and (e) that a substantial increase in the carriers' revenue will result from the proposed increase in the intrastate rates. *North Carolina* v. *United States, supra.* The Court further held in that case that the power of the Commission to require states to raise their intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operation costs and to yield a fair return on the value of the property directed to the transportation service both interstate and intrastate. Moreover, it reaffirmed the doctrine

that the Commission could not require intrastate rates to be raised above a reasonable level.

The Interstate Commerce Commission is granted wide powers to prescribe rates on interstate freight as well as other transportation matters. That function belongs primarily and excusively within the limits of the Act to the Commission; however, its authority over intrastate rates is limited as above set out and Section 13 (4) of the Act was never intended to deprive the state commission of their primary authority to regulate intrastate rates. There is a point where the power of the state commission ceases and the power of the Interstate Commerce Commission begins, but as stated by Mr. Justice Black in the *North Carolina* case, it is not always easy to designate that point.

Other principles of law have been clearly declared by the Supreme Court of the United States. Intrastate traffic must bear a fair proportionate share of the costs of maintaining an adequate railway system. *Wisconsin Railroad Commission* v. *Chicago V.* [*B.*] *& Q. Railway,* 257 U. S. 563. It is within the power of the Interstate Commerce Commission to determine if the intrastate rates do that; however, before it can alter intrastate rates the justification therefor must clearly appear and be supported by substantial evidence. It is not sufficient that there be simply a difference between interstate rates fixed by the Commission and the intrastate rates as fixed by the state commission. The fixing of intrastate rates is primarily the duty of the state commission and the record in this case demonstrates that the Mississippi Commission

gave great study and investigation and heard much testimony before the Commission itself and not through an examiner. If the evidence is substantial to support the finding of the Interstate Commerce Commission, then its power and its conclusions override that of the state commission, but a mere disparity of itself in the rates fixed by each commission is not sufficient. *Florida* v. *United States,* 282 U. S. 194. Whenever the findings of the Commission are supported by substantial evidence, then the findings of such commission are conclusive upon the courts, but if such findings are not supported by substantial evidence, then the matter is one for the court to determine and such order cannot be upheld. In determining in the first instance whether intrastate rates should be raised or lowered the Interstate Commerce Commission is allowed wide latitude in directing that intrastate rates be increased and may take into consideration material and reports which were before the Commission in previewing a nationwide increase in interstate freight rates. The Commission's jurisdiction over intrastate rates is not limited to cases where those rates are confiscatory. *King, et al.* v. *United States, et al.,* 344 U. S. 254.

The Court in reviewing an order of the Interstate Commerce Commission has the duty to study the entire record and it is the function of the Court to determine from the whole record whether or not there was substantial evidence before the Commission upon which its order could be based. If there were no substantial evidence then it is the duty of the Court to set aside such order and enjoin its enforcement. Congress

in enacting in 1946 the Administrative Procedure Act made it mandatory that the reviewing court should set aside an order that was unsupported by substantial evidence and that it should review the whole record in making the determination. The Supreme Court of the United States in *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, held that in determining what is substantial evidence that the Court must take into consideration whatever in the record fairly detracts from its weight. Under the decision in that case it is the duty of the reviewing court when it cannot conscientiously find that the evidence supporting the order of the Commission is substantial, when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view, to set aside the order of the Commission.

Substantial evidence is a legal term and presents to the court for adjudication a question of law. It is a term that frequently appears in the construction of many laws. There are many instances in which judgments are required to be supported by substantial evidence. The verdicts of juries in some states are required to be supported by substantial evidence and it then becomes a question for determination by the court as to whether or not a verdict is supported by substantial evidence and if it is not, then the court reverses and directs that judgment be entered when not supported by substantial evidence. The decisions on this matter are numerous. See Words and Phrases, Permanent Edition, Vol. 40, 1954, Annual Pocket Part, P. 88. Substantial evidence is a term that cannot be defined defi-

nitely, but whether the evidence in a particular case amounts to substantiality must be determined from the facts of each case as it arises.

The order in this case when viewed in the light of the entire record and all of the circumstances leading up to its passage and giving weight to all things that detract from the sufficiency of the evidence is not supported by substantial evidence and must be set aside and its enforcement enjoined. It is a delicate duty placed upon the reviewing court to determine the line of demarkation and to adjudicate the point where the authority of the state commission ends. The court does not have the power to settle disputes in the testimony, but it must consider the entire record and determine as a matter of law if there was substantial evidence to support the order. The record shows that in making the investigation for the nation as a whole in Ex Parte No. 175 that the Commission at that time was making a determination that the intrastate rates should be increased as well as the interstate rates. That will not do. There must be a finding based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission

were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers. The record of the evidence in the case reflects a favorable financial condition of the railroads involved herein when contrasted with that of the railroads of the country as a group. The statistics introduced in evidence and reflected by the various reports show that the national average of returns for the railroads was 4.02 percent; whereas, the condition of the railroads involved in this controversy was in a better financial situation and their earnings greater than the 4.02 percent. The Interstate Commerce Commission in Ex Parte No. 175, when granting freight rate increases took into consideration the losses sustained by the railroads in passenger operations. This was correct and was upheld in *King* v. *United States,* 344 U. S. 254, but in determining the intrastate rate in Mississippi the Commission refused to take into consideration the lower passenger deficits which prevailed in Mississippi. There is no testimony in the record having probative force showing that the rates in Mississippi were abnormally low other than the disparity that exists between the interstate rates and the intrastate rates which within itself is not sufficient. Different conditions, circumstances and situations in different states require and justify different results in fixing intrastate rates. The findings of a state commission which is familiar with such conditions in the state, with the location of competing highways and other forms of carriers, when its opinion differs from the Interstate Commerce Commission's findings detracts heavily against the findings of the In-

terstate Commerce Commission, whose testimony is taken before an examiner. The record shows in this case that the need of the carriers involved here for additional revenue is not as great as the needs of the railroads of the country as a whole. The statistics introduced in evidence and now in the record demonstrate this.

The testimony of the various witnesses who are shippers of many of the products involved herein demonstrates that if the rates are permitted to stand as fixed by the Interstate Commerce Commission, the income of the railroads will be reduced rather than increased. Many of these are shippers themselves and testified positively and unequivocally that it would be economy for them to use their own individual trucks or private carriers by truck, who are unregulated so far as rates are concerned in Mississippi. When the intrastate freight rate level on a given commodity is at such level that any increase in the rate would have the effect of diverting traffic from the rail carriers to competing forms of transportation, then it would follow that the revenue derived would be diminished rather than increased. In fixing reasonable rates competition is one of the elements to be considered and is frequently controlling. See *Interstate Commerce Commission* v. *Great Western Railway Company,* 141 Fed. 1003. In determining the legal question as to whether the evidence amounts to substantiality and in adjudicating whether there was substantial evidence or not, the court likewise must weigh such factors. The record shows in this case that the Mississippi Commission was thoroughly familiar with the competition prevailing and with the location of

the sites for gravel, the location of the highways and as a matter of fact, in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission, but, of course, its findings must yield to those of the Interstate Commerce Commission, if the record as a whole shows that there was substantial evidence.

The Interstate Commerce Commission found that the increase granted in the rates by it would produce more than $550,000.00 annually on all of the commodities involved. This finding was based upon estimates made by experts of the railroad companies that such revenue would be produced if the rate increase be given. The testimony upon this proposition is exceedingly weak. It is based upon the presumption that the same amount of freight traffic would continue under the increased rate as had theretofore been carried at the lower rate. This assumption and opinion is contrary to the sworn testimony of those who were in position not only to know but also to control large quantities of the products upon which the rate was increased. The evidence to support this finding when weighed in the light of the prevailing rule of law is not sufficient to amount to substantial evidence.

The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but their testimony has been fully weighed in the light of the entire record and proceedings in this cause and when viewed in this light the testimony fails to show substantiality sufficient to uphold the order here under

attack and the findings that were made by the Interstate Commerce Commission. It would unduly prolong this opinion to undertake to point out in detail the testimony of the various witnesses and the things that detract from the substantiality of the evidence, but it is demonstrated more closely with reference to sand and gravel, the pulpwood and the fertilizer and cement that is involved. The record is clear in this case that the revenue needs of the railroads of the Eastern District and in the South or Western District and the financial condition of the petitioning railroads involved in this case are in better condition than the national average.

On the trial before this Court there was introduced in evidence Plaintiff's Exhibit 4, which was a petition by the railroads made to the Interstate Commerce Commission seeking a modification of the Commission's order so as to authorize lower rates upon sand and gravel and Plaintiff's Exhibit 5, being an order thereon granting the prayer of the petition. There was no objection to the introduction of these documents but even if they should have been irrelevant as having occurred since the filing of the suit, it still would be true that there was not sufficient substantial evidence to support the order but if these documents be considered they simply demonstrate that the higher rate given the railroads would cause the traffic to divert to competitors. The commodities involved in this controversy require shorter hauls than do the interstate shipments and are therefore more susceptible to competition. On all of the commodities involved in the controversy the competition by carriers is keen and

would come not only from regulated trucks for hire but from unregulated trucks and from trucks owned and operated by the shippers themselves. This is clearly shown by the record by positive testimony and overwhelmingly overthrows and overrides the opinions of the experts.

The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole. The Mississippi Commission offered evidence showing that passenger deficits in Mississippi were substantially less than passenger deficits of the same railroads for their system-wide operation and according to the statistics introduced there was a vast difference. Passenger deficit is an element to be taken into consideration in rate making by the Interstate Commerce Commission, and as a matter of law, it is the duty of that Commission to consider it in determining whether rates should be increased or decreased, and if the passenger deficit in Mississippi was less than that of the nation as a whole, it was the duty of the Commission to give proper consideration to this testimony. *King* v. *United States, supra.*

At the time the original complaint herein was filed and at the time of the hearing and when the case was submitted to the Court for judgment, cement in carload lots was one of the commodities involved and an intervention by the Marquette Cement Manufacturing Company was allowed but since that date the Marquette Cement Manufacturing Company, one of the intervening plaintiffs, moved to be permitted to withdraw

its intervention for the reasons stated in the motion and likewise the plaintiff moved to amend its complaint so as to eliminate cement from the commodities at issue and without objection an order was entered on the 13th day of September 1954, sustaining each of said motions. The complaint was amended so as to eliminate cement and the petition of the Marquette Cement Company was dismissed for the reasons stated in said motions, there being no objections from any one to these motions.

For the reasons herein stated the order of the Interstate Commerce Commission will be set aside and its enforcement enjoined.

Order may be drawn in accord herewith.

Jackson, Mississippi, September 21, 1954.

(S) E. R. HOLMES,
United States Circuit Judge.

(S) S. C. MIZE,
United States District Judge.

———— ————,
United States District Judge.

In the United States District Court for the Southern District of Mississippi, Jackson Division

Civil Action No. 2120

MISSISSIPPI PUBLIC SERVICE COMMISSION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

OPINION

THOMAS, *District Judge,* dissenting:

As stated by Judge Mize in the majority opinion, the paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission. The law is well settled "that an order of the Commission is entitled to finality, and may not be set aside, modified, or disturbed on judicial review, if such order of the Commission lies within the scope of the Interstate Commerce Statute, and is based upon adequate findings that are supported by substantial evidence.[1] There is no question but that the order of the Commission lies within the scope of the statute. In discussing the limitation upon the right of courts to review orders of the Commission, in the case of Interstate Commerce Commission *v.* Union Pacific Railroad

[1] *Louisiana Public Service Commission* v. *United States of America and the Interstate Commerce Commission*, U. S. District Court, Eastern District of Louisiana, decided July 9, 1954.

Company, 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108, the court said:

> In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In my opinion, the findings made by the Commission in support of its conclusion are entirely adequate, and fulfill the needs emphasized in the case of *North Carolina et al.* v. *United States et al.*, 325 U. S. 507, 89 L. Ed. 1760, 65 S. Ct. 1260.

The record must be considered as a whole. I have considered the record as a whole and am of the opinion that on the authority of *King, et al.* v. *United States et al.*, 344 U. S. 254, 97 L. Ed. 301, 73 S. Ct. 259, the order complained of has a rational basis in adequate findings, which are supported by substantial evidence.

I respectfully dissent from the majority opinion.

(S) DANIEL H. THOMAS.

APPENDIX B

In the United States District Court for the Southern District of Mississippi, Jackson Division

Civil Action No. 2120

MISSISSIPPI PUBLIC SERVICE COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

FINAL JUDGMENT

This cause came on for hearing before the statutory three-judge court duly convened by the Chief Justice of the Circuit pursuant to Sections 2284 and 2325 of Title 28 of the United States Code by designating as additional judges the Honorable E. R. Holmes, Justice of the Court of Appeals for the Fifth Circuit, and the Honorable Daniel H. Thomas, Judge of the United States District Court for the Southern District of Alabama, upon final hearing upon the complaint of the Mississippi Public Service Commission, plaintiff in the above entitled cause, praying for a final decree that the report of the Interstate Commerce Commission dated November 2, 1953, and its order dated February 1, 1954, and each of them, are unlawful, null and void, and that the enforcement of said report and order be permanently enjoined, restrained, annulled and set aside, and that the Interstate Commerce Commission be directed to enter an order dismissing the proceedings entitled

In The Matter of Mississippi Intrastate Freight Rates and Charges, I. C. C. Docket No. 31164, in which said report and order were entered.

It appearing that the above entitled cause was duly set down for final hearing at Jackson, Mississippi, on the 31st day of May, 1954, and that proper notice of said hearing was given to the plaintiff, the defendants and to all intervenors herein, and that all parties were present in person or by counsel; and, upon consideration of the plaintiff's verified complaint and the answers thereto, and upon consideration of the record of the proceedings before the Interstate Commerce Commission in that proceedings entitled In The Matter of Mississippi Intrastate Freight Rates and Charges, I. C. C. Docket No. 31164, and upon consideration of all other evidence introduced at the hearing, and the arguments and briefs of counsel, the Court is of the opinion and finds that the plaintiff, Mississippi Public Service Commission, is entitled to a permanent injunction and to the relief prayed for in its complaint for the reasons more fully set forth in majority opinion heretofore filed in this case.

It is, therefore, ordered, adjudged and decreed by said statutory three-judge court that the report of the Interstate Commerce Commission dated November 2, 1953, and its order dated February 1, 1954, both having been entered in that proceedings entitled In The Matter of Mississippi Intrastate Freight Rates and Charges, I. C. C. Docket No. 31164, and each of them, are unlawful, null and void, and that the enforcement thereof be, and it is hereby, permanently enjoined, restrained, annulled and set aside, and that the Interstate

Commerce Commission be, and it is hereby, directed to enter an order dismissing the above entitled proceedings.

It appearing to the Court that the parties intervening on the side of the defendants in this action are quite numerous, it is further ordered that service of this order on their counsel shall be equivalent to personal service on them.

So ordered, adjudged and decreed this the 12th day of October, 1954.

/s/ E. R. HOLMES,
Judge of the Court of Appeals for the Fifth Circuit.

/s/ S. C. MIZE,
Judge of the United States District Court for the Southern District of Mississippi.

I dissent from the foregoing for the reasons set forth in my dissenting opinion heretofore filed in this cause.

/s/ DANIEL H. THOMAS,
Judge of the United States District Court for the Southern District of Alabama.

U. S. GOVERNMENT PRINTING OFFICE: 1955